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No. 85-55

In the

Supreme Court of the United States

October Term, 1985

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES,

Petitioner,

vs.

LORRAINE POLASKI, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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52 pp

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	i
RESPONDENTS' STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	11
A. The Eighth Circuit's Decision on 405(g) Jurisdiction Does Not Conflict with Supreme Court Precedent	13
B. The Eighth Circuit Was Justified in Assuming Jurisdiction Over all Class Members	27
C. The Conflict Between the Eighth and the Fourth Circuits Does Not Warrant Supreme Court Review	33
D. There Are No Other Reasons to Grant Review	35
CONCLUSION	39
RESPONDENTS' APPENDIX	1a

TABLE OF AUTHORITIES

PAGE

CASES

Avery v. Heckler, 584 F.Supp. 312 24

Caswell v. Califano, 583 F.2d 9 24

City of New York v. Heckler, 742 F.2d 729, pet. for rehearing denied, 755 F.2d 31 . . 20, 21

Heckler v. City of New York, petition for cert. pending, No. 84-1923 (filed June 7, 1985) 13, 25, 40

Heckler v. Owens, appeal docketed, No. 84-1905 (June 5, 1985) 13, 40

Heckler v. Ringer, __ U.S. __, 104 S.Ct. 2013 . . . . .14, 16, 17 . . . . .18, 19, 20, 21, 22, 25, 26, 27

Holden v. Heckler, 584 F.Supp. 463 24

Hyatt v. Heckler, 757 F.2d 1455 33

Johnson v. Heckler, No. 85-1254, (7th Cir., July 30, 1985), aff'g 607 F.Supp. 875 . . . . . 21, 22

Liberty Alliance of the Blind v. Califano, 568 F.2d 333 24

TABLE OF AUTHORITIES (con't)

PAGE

CASES

Mathews v. Eldridge, 424 U.S. 319 . . . . . 14, 15, 16 . . . . . .77, 22, 23, 25

Mattern v. Mathews, 582 F.2d 248 24

Mental Health Association of Minnesota v. Heckler, 720 F.2d 965 . . . . . 24, 31

Nelson v. Heckler, 712 F.2d 346 31

Reed v. Heckler, 756 F.2d 779 21

Weinberger v. Salfi, 422 U.S. 749 . . . . . .13, 14, 28, 29, 32

STATUTES

Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 (1984) . . . . . 9, 35 . . . . . 36, 37

Social Security Act:
42 U.S.C. §405(g) . . . 6, 10, 12, 14 . . . . . 15, 27

42 U.S.C. §416(i)(1) 3

MISCELLANEOUS

Social Security Ruling 82-58 4

RESPONDENTS' STATEMENT OF THE CASE

This action was brought by respondents Lorraine Polaski and Patrick J. Blaschko on behalf of themselves and an Eighth Circuit wide class of disabled persons, challenging certain policies employed by the Secretary of Health and Human Services in administering disability programs under the Social Security Act.[1]

Lorraine Polaksi was originally found eligible for disability benefits under Title II of the Social Security Act in 1979. In July of 1982, she was notified that the Secretary had determined that she was no longer disabled. Ms.

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[1]Respondents originally challenged the Secretary's policies regarding the medical improvement and pain standards. The challenge to the medical improvement standard was ultimately resolved by a combination of legislation and court of appeals decision, and is not at issue before the Court.

Polaski appealed the termination and appeared at a hearing before an Administrative Law Judge (ALJ) employed by the Social Security Administration. In upholding the termination of Ms. Polaski's disability benefits, the ALJ specifically found that her complaints of pain were credible. He felt constrained to terminate her benefits, however, because the objective medical evidence did not fully support the subjective allegations. Polaski Transcript, 29.

Patrick Blaschko began receiving disability benefits in December, 1975. When his benefits were terminated in 1981, the Secretary refused to give any consideration to Mr. Blaschko's allegations of pain on the grounds that the objective medical evidence in the record did not confirm his subjective complaints. Blaschko Transcript, 15.

Respondents challenged the standard used in evaluating a disability claimant's allegations of pain or other subjective complaints. Respondents acknowledged from the outset of the litigation that the Social Security Act has always required disability claimants to demonstrate the existence of their underlying impairment through the use of objective medical evidence.[2] Respondents contended, however, that neither the Act nor Eighth Circuit case law permitted the Secretary to insist that a disability claimant also demonstrate that the severity of his symptoms was wholly commensurate with the objective medical data in

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[2]The Social Security Act defines disability as the inability to engage in substantial gainful activity as the result of a "medically determinable physical or mental impairment." 42 U.S.C. §416(i)(1).

order to be found disabled.

The respondents maintained that the Secretary's policies, in particular the following language from Social Security Ruling 82-58, improperly directed disability claims adjudicators to demand that the objective medical evidence fully corroborate a claimant's allegations about the severity of his pain before disability status could be established:

> Once . . . a medical condition (e.g. disc disease) is objectively established, the symptoms are still not controlling for purposes of evaluating disability. Clinical and laboratory data and a well-documented medical history must establish findings which may reasonably account for the symptom in a particular impairment. Objective clinical findings which can be used to draw reasonable conclusions about the validity of the intensity and persistence of the symptom and about its effect on the individual's work capacity

> must be present. For example, in cases of back pain associated with disc disease, typical associated findings are muscle spasm, sensory loss, motor loss and atrophy. There must be an objective basis to support the overall evaluation of impairment severity. It is not sufficient to merely establish a diagnosis or a source for the symptom. (Emphasis added.)

A long line of Eighth Circuit cases had consistently held that the Social Security Act did not permit the Secretary to require claimants to prove a direct cause and effect relationship between the objective medical evidence and the degree of pain which they suffered.

Respondents claimed that the Secretary's policies regarding pain violated the Social Security Act. They also alleged that the Secretary's policies ignored and conflicted with previous decisions of the Eighth Circuit,

thereby violating the United States Constitution.

The district court issued a class wide preliminary injunction for the respondents. The court determined as a threshold matter that it had jurisdiction over the claims of the entire class under 42 U.S.C. §405(g).

The court then found that the Secretary's pain standard violated the Social Security Act. The court also found that the Secretary's failure to follow established Eighth Circuit precedent regarding the proper standard for evaluation of pain violated the Constitution. Pet. App. 53a.

In reaching this conclusion, the district court pointed to the existence of at least 19 Eighth Circuit opinions clearly setting forth its position on the proper evaluation of pain. Pet. App.

54a.

On appeal to the Eighth Circuit, the Secretary challenged the district court's assumption of jurisdiction over class members who had not fully exhausted their administrative remedies. The Secretary also argued that her official policy regarding the evaluation of pain was in compliance with Eighth Circuit case law.

At oral argument the court encouraged the parties to attempt to reach an agreement regarding the proper pain standard. The parties then entered into an agreement which accurately reflected Eighth Circuit law on the proper evaluation of pain and other subjective complaints. This agreement was incorporated into an order which the Eighth Circuit issued on July 17, 1984. Pet. App. 27a.

In the stipulation which was incorporated into the court's order, the

Secretary conceded that the standard which she was agreeing to was not the standard that had actually been applied in the past by claims adjudicators within the Eighth Circuit. The Secretary admitted that adjudicators had been interpreting the language of Social Security Ruling 82-58 as requiring that allegations of pain be disregarded unless fully corroborated by objective medical findings. The stipulation expressly directed adjudicators in the future to give full consideration to subjective complaints. Pet. App. 29 and 30a. The July 17 order further directed the Secretary to immediately transmit the stipulation to all adjudicators within the Eighth Circuit.

While the case was pending before the Eighth Circuit, Congress passed the Social Security Disability Benefits Reform Act of 1984. The statute included

several provisions concerning the pain standard.[3] In a decision dated December 31, 1984, the Eighth Circuit rejected the Secretary's argument that the Disability Benefits Reform Act superceded the stipulation set forth in its July 17 order regarding the proper standard for the evaluation of pain.

The court found that the pain standard enunciated in the July 17 order was entirely consistent with the standard adopted by Congress in the Disability Benefits Reform Act and would consequently remain in effect in the Eighth Circuit.

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[3]Pub. L. No. 98-460, 98 Stat. 1794 (1984). The statute contained language describing the factors to be considered in evaluating disability claims based on pain. This provision is to be effective until January 1, 1987. The statute also created a commission to study the subject of pain and directed the commissioner to report back to Congress by December 31, 1985.

In making this determination, the court relied on a) the legislative history of the statute, which stated that the Reform Act was intended to codify current Social Security Administration policy on the evaluation of pain, and b) the express declarations of the Secretary in her briefs that the stipulated agreement was a clarification of existing agency policy in the area. Pet. App. 16a-17a.

The court also upheld the district court's finding that jurisdiction existed under 405(g) over all members of the class regardless of whether or not they had exhausted their administrative remedies. In order to ensure that all members of the class would have an opportunity to have their allegations of pain evaluated under the correct standard, the court required the Secretary to reconsider the claims of those pain class

members whose cases were last evaluated prior to issuance of the July 17 order. Pet. App. 24a.

The Secretary has asked this Court to review the Eighth Circuit's decision on jurisdiction. She has not appealed the lower court's decision on the merits regarding the pain standard. The stipulation contained in the July 17 order remains in effect throughout the Eighth Circuit.

REASONS FOR DENYING THE PETITION

This case does not raise substantial questions appropriate for Supreme Court review. The Eighth Circuit's decision on jurisdiction does not conflict with Supreme Court precedent.

Moreover, the impact of the decision is limited. The specific pain standard contained in the July 17 order has been applied in all cases within the Eighth Circuit raising allegations of pain which

have been processed since that date, and will continue to be applied to pain claims within the Eighth Circuit in the future. The court's assumption of jurisdiction over all class members, therefore, provides the opportunity for reconsideration of their claims to a relatively small group of individuals; namely, those pain class members whose disability benefit claims were last reviewed prior to issuance of the Eighth Circuit's order of July 17, 1984.[4]

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[4]As the Eighth Circuit noted in its December 31, 1984 opinion, the district court carefully tailored the class here to include only those individuals who received an adverse decision from the Secretary within 60 days prior to the filing of the complaint. Pet. App. 23a. Thus, this case does not present the issue of whether or not the 60 day requirement of §405(g) is jurisdictional or a statute of limitations, as do several other cases which are currently pending before the Court.

Respondents believe that the Secretary's petition for certiorari in this matter should be denied. In the alternative, as the Secretary suggests in her petition, the Court should hold this case for disposition in light of its disposition or decision in Heckler v. City of New York, petition for cert. pending, No. 84-1923 (filed June 7, 1985), and Heckler v. Owens, appeal docketed, No. 84-1905 (June 5, 1985) Pet. 13, 16.

A. The Eighth Circuit's Decision on 405(g) Jurisdiction Does Not Conflict With Supreme Court Precedent.

The Eighth Circuit's decision in this case finding jurisdiction over members of the class who have not fully exhausted their administrative remedies does not conflict with the decisions of this Court in Weinberger v. Salfi, 422

U.S. 749 (1975), Mathews v. Eldridge, 424 U.S. 319 (1976) or Heckler v. Ringer, __ U.S. __, 104 S.Ct. 2013 (1984). The Eighth Circuit's assumption of jurisdiction was entirely consistent with previous decisions of this Court on the question of jurisdiction under §405(g) of the Social Security Act.

The Secretary has misstated the holdings of Salfi, Eldridge, and Ringer. The Court has not held that waiver is appropriate only where the precise set of facts found in Salfi or Eldridge are present. To the contrary, these three cases, when read together, suggest a flexible approach to waiver in which decisions must be made on a case by case basis.

There are two prerequisites to a finding of jurisdiction under 42 U.S.C. §405(g). Mathews v. Eldridge, 424 U.S. 328 (1976). The first calls for

presentment of a claim to the Secretary. This requirement cannot be waived. The Secretary does not allege that respondents in this case fail to meet the presentment requirement.

The second prerequisite to jurisdiction under §405(g) is the requirement that plaintiffs exhaust their administrative remedies before seeking relief from the courts; judicial review is generally limited to situations where there has been a "final decision of the Secretary made after a hearing to which he was a party." Unlike the presentment requirement, however, the exhaustion requirement can be waived either by the Secretary, or, in appropriate circumstances, by the court. Eldridge, supra, 330.

This Court held in Mathews v. Eldridge that the determination of whether or not waiver is appropriate is

essentially a balancing test: "cases may arise where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate." 424 U.S. at 330. This basic principle was reaffirmed in Ringer: "in certain special cases, deference to the Secretary's conclusion as to the utility of pursuing the claim through administrative channels is not always appropriate." Heckler v. Ringer, __ U.S. __, 104 S.Ct. at 2023.

This Court also stated in both Mathews v. Eldridge and Heckler v. Ringer that in evaluating the question of waiver courts should look to a number of factors, including, most importantly, the existence of collateral issues and the potential for irreparable harm. Heckler v. Ringer, __ U.S. __, 104 S.Ct. 2013

(1984); Mathews v. Eldridge, 424 U.S. 319 (1984).

Eldridge emphasized that the "core principle" regarding waiver of exhaustion is that "statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered." Mathews v. Eldridge, 424 U.S. 332 n. 11 (1976). The Eighth Circuit correctly considered the factors suggested by the Court and applied the Court's flexible, pragmatic approach to waiver to the facts of this case.

The main thrust of the Secretary's argument is that in light of the Court's recent decision in Heckler v. Ringer, respondents'claims here are not sufficiently collateral to their underlying claim for disability benefits to justify waiver. Pet. 13. This argument distorts

the nature of the claim in Ringer and ignores the fundamental distinction between that claim and the questions raised by respondents in this case.

In the first place, Ringer did not alter the basic law on exhaustion. The Court in Ringer merely found that, given certain characteristics of the plaintiffs' claims -- characteristics which are not present in this case -- waiver of the exhaustion requirement was not appropriate.

Ringer involved a challenge to the Secretary's refusal to cover BCBR surgery -- a technique performed to relieve respiratory distress -- under the Medicare Act. Plaintiffs alleged that the Secretary had a constitutional and statutory obligation to provide payment for BCBR surgery. This Court found that plaintiffs' challenge to the Secretary's

procedures was equivalent to a claim that they should be paid for their BCBR surgery. The Court found the procedural claims to be "inextricably intertwined " with the plaintiffs' claim for reimbursement. This was so because following a declaration that BCBR surgery is a covered service, "only essentially ministerial details will remain before respondents would receive reimbursement." Heckler v. Ringer, __ U.S. __, 104 S.Ct. at 2022.

The situation in this case is quite different. The relevant challenge here involved the procedures which the Secretary uses to evaluate disability claimants' allegations of pain and other subjective complaints. Successful resolution of this claim does not resolve the underlying issue of eligibility for benefits. Here, unlike in Ringer, success on the merits does not automatically or

necessarily lead to the payment of disability benefits.

Respondents have sought to have their entitlement to benefits determined by the Secretary in accordance with proper standards. However, the eligibility of class members for these disability benefits remains an open question to be determined in individual cases by the Secretary. Respondents' claims in this case are collateral within the meaning of the Ringer decision because the relief which they have sought in no way predetermines their entitlement to benefits.

In assuming jurisdiction here over class members who have not fully exhausted their administrative remedies, the Eighth Circuit was simply recognizing this crucial distinction, as had the Second Circuit earlier in its decision in City of New York v. Heckler, 742 F.2d 729

(2d Cir. 1984), pet. for rehearing denied, 755 F.2d 31 (2d Cir. 1985). The Tenth Circuit and the Seventh Circuit have recently reached the same conclusion. Reed v. Heckler, 756 F.2d 779 (10th Cir. 1985); Johnson v. Heckler, No. 85-1254 (7th Cir., July 30, 1985), aff'g 607 F.Supp. 875 (N.D. Ill. 1984).

Johnson v. Heckler was a case challenging the Secretary's regulations involving the sequential evaluation of claims for disability benefits under the Social Security Act. The Johnson court affirmed the district court's inclusion in the class of individuals who had not exhausted their administrative remedies. In doing so, the court distinguished between the plaintiffs in Ringer, who were, "at bottom," simply seeking reimbursement for BCBR surgery, and the plaintiffs in Johnson, who like the plaintiffs in this case, would not be guaranteed benefits

even if they prevailed on their statutory and constitutional claims. The Seventh Circuit found that under these circumstances "the plaintiffs' claims are sufficiently collateral to their benefit claims to justify waiver." Johnson, Slip. Op. at 9.

The Secretary also maintains that respondents have not demonstrated that class members are likely to suffer irreparable harm if exhuastion is not waived. Pet. 13.

In making this argument, the Secretary ignores the clear finding of the Eighth Circuit that class members do face irreparable harm when their claims are not processed under proper standards. She also misreads the holdings in Mathews v. Eldridge and Heckler v. Ringer regarding irreparable harm.

The court below specifically affirmed the district court's finding on irreparable harm:

> The district court found, and we agree, that the plaintiffs face potentially irreparable harm. In the district court's words,
>
> > It is hard to envision a more urgent situation. Claimants who lose or are denied benefits face foreclosure proceedings on their homes, suffer utility cutoffs and find it difficult to purchase food. They go without medication and doctors' care; they lose their medical insurance. They become increasingly anxious, depressed, despairing -- all of which aggravates their medical conditions.

Pet. App. 20 and 21a.

Moreover, the Secretary errs in attempting to characterize the harm suffered by the class here as somehow distinct from that suffered by the plaintiff in Eldridge. Pet. 13. Lower courts have consistently relied on Eldridge to find

irreparable harm in situations that are entirely analagous to that presented here. These courts have routinely recognized that disability benefit claimants who challenge the validity of procedures used to evaluate their claims do face potentially irreparable harm that cannot adequately be compensated by a subsequent retroactive award of benefits. Liberty Alliance of the Blind v. Califano, 568 F.2d 333, 345 (3rd Cir. 1977); Mattern v. Mathews, 582 F.2d 248, 253 (3rd Cir. 1978); Caswell v. Califano, 583 F.2d 9, 14 (1st Cir. 1978); Mental Health Association of Minnesota v. Heckler, 720 F.2d 965, 970 (8th Cir. 1983); Avery v. Heckler, 584 F.Supp. 312, 319 (D. Mass. 1984), aff'd on other grounds, 762 F.2d 158 (1st Cir. 1985); Holden v. Heckler, 584 F.Supp. 463, 482, 499 (N.D. Ohio 1984).

The Secretary also claims that irreparable harm cannot exist here because the administrative review process set up by Congress assumes that where claims are erroneously denied during that process a later award of accrued benefits will always provide adequate compensation for the error. Pet. in Heckler v. City of New York, 22. In making this argument the Secretary misconstrues the decisions in Eldridge and Ringer.

Neither Ringer nor Eldridge stand for the proposition that disability benefit claimants who challenge the procedures used to evaluate their claims are in the same position vis a vis irreparable harm as claimants whose only challenge is to the substantive merits of the adjudication. If that were the case, the concept of irreparable harm in the exhaustion context would be meaningless.

Indeed, the statement in Ringer that "Congress must have felt that cases of individual hardship resulting from delays in the administrative process had to be balanced against the potential for overly casual or premature judicial intervention . . ." Heckler v. Ringer, __ U.S. __, 104 S.Ct. at 2028, recognizes that there will be situations where the balance must be struck in favor of judicial intervention. Intervention is not either overly casual or premature where there are collateral claims. It is in precisely those situations where claimants challenge the procedural evaluation scheme, as opposed to the ultimate decision on the merits, where exhaustion should not be required.

The Eighth Circuit decision waiving the exhaustion requirement does not conflict with Supreme Court precedent. The Eighth Circuit waived exhuastion, where

the Court in Ringer did not, because the factual circumstances in this case differed in significant respects from those in Ringer. The same legal standard was applied in both instances. Differing results are to be expected where the facts to which the legal standard applies vary. The Court cannot, and should not, accept review each time a lower court decides to waive the exhaustion requirement. This case simply does not present the kind of significant policy question appropriate for resolution by the Court.

B. The Eighth Circuit Was Justified in Assuming Jurisdiction Over all Class Members.

The court of appeals was correct when it found that deference to the Secretary's exhaustion requirement was not necessary and consequently assumed jurisdiction under 405(g) over all

members of the class.

Deference to the Secretary was especially inappropriate in this case because respondents' complaint below raised the constitutional claim of non-acquiescence regarding the Secretary's failure to follow the proper standard in evaluating allegations of pain. The district court's decision in respondents' favor on the pain issue was based on non-acquiescence grounds; this decision was not reversed by the Eighth Circuit.

The non-acquiescence claim is one which the Secretary is uniquely incapable of resolving through the administrative process. Under these circumstances it serves no useful purpose to insist on a final administrative decision from the Secretary before permitting judicial review. For this reason the situation here is analagous to that in Weinberger

v. Salfi, 422 U.S. 749 (1975), and waiver was entirely appropriate.

The Secretary asserts that the Eighth Circuit's assumption of jurisdiction was especially unwarranted because, she claims, the court below endorsed her "overall approach" to the evaluation of complaints of pain and therefore had no basis upon which to assume that a significant percentage of disability claims involving pain had been decided incorrectly. Pet. 14. Nothing could be further from the truth. In fact, the court expressed its strong disapproval of the Secretary's approach to claims alleging pain in finding that waiver of exhaustion was appropriate. Pet. App. 21a.

Over the course of the past several years the Eighth Circuit has repeatedly taken the Secretary to task for her improper handling of disability claims

involving allegations of pain or other subjective complaints. When respondents filed their lawsuit in April of 1984, there were at least 19 reported Eighth Circuit cases in which the court had felt it necessary to emphasize that the Secretary was not free to reject a claimant's subjective complaints of pain simply because they were not fully corroborated by the objective medical evidence. Pet. App. 38a.

Time after time, the court expressed its frustration in these cases with the fact that agency adjudicators were applying the wrong standard to claims involving pain:

> For some unexplained reason, the Secretary insists upon ignoring this Court's statements with respect to the proper evaluation of pain. The Secretary must give consideration to subjective complaints of pain and may not disregard them solely because they are not fully

> corroborated by the objective medical evidence.

Nelson v. Heckler, 712 F.2d 346, 348 (8th Cir. 1983). See also Pet. App. 55a.

In determining that deference to the Secretary was not appropriate in this case, and that consequently waiver of the exhaustion requirement was justified, the court noted that "In 1984 alone, we reversed or remanded to the Secretary because of inadequate consideration of pain in at least 12 cases, while affirming the Secretary's analysis of pain or other subjective complaints in none." Pet. App. 21a. The court commented that this high reversal rate "fortifies our decision to waive exhaustion in light of the potentially irreparable harm incurred by plaintiffs as a result of this procedural irregularity." Pet. App. 22a, citing Mental Health Association of Minnesota v. Heckler, 720 F.2d at 970.

Moreover, the Secretary conceded in the stipulation that was incorporated into the July 17 order that agency adjudicators had not been applying the correct pain standard in their day to day work evaluating claims. Pet. App. 11a. It is significant in this regard that the Secretary did absolutely nothing to ensure that agency adjudicators understood and applied the appropriate pain standard until pressured to do so by the court.

This was clearly not a situation involving the sort of "isolated errors" that the Secretary could be relied upon to correct on her own initiative. Pet. 14; Weinberger v. Salfi, 422 U.S. 766 (1975). The court below had every justification, based on its past experience and on the Secretary's own admissions, for finding that, prior to entry of its July 17, 1984 order, claims involving

pain or other subjective complaints were routinely handled improperly by adjudicators at every level of administrative review. Under these circumstances deference to the agency was undoubtedly not required.

C. The Conflict Between the Eighth Circuit and the Fourth Circuit Does Not Warrant Supreme Court Review.

The Fourth Circuit has found that class members challenging the Secretary's policies regarding the evaluation of diabetes, pain and hypertension in that circuit must fully exhaust their administrative remedies before seeking judicial review. Hyatt v. Heckler, 757 F.2d 1455, 1460 (4th Cir. 1985). While the Fourth and Eighth circuits have reached different conclusions about the appropriateness of waiver, their disagreement does not represent a conflict

which is significant enough to warrant Supreme Court review.

The circuits do not disagree over the relevant legal issues. Both circuits recognize the fundamental principles that govern decisions on exhaustion. The courts differed in their application of the facts to the law, not over those fundamental principles.[5] For this reason, the conflict here does not provide evidence of a dispute over a substantive policy issue.

Moreover, because the decisions do not break any new ground regarding the law on exhaustion, they are unlikely to have a significant impact on cases

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[5]The Fourth Circuit decided against waiver because it felt that plaintiffs' claims were "inextricably intertwined" with their underlying claims for benefits, while the Eighth Circuit found that the procedural claims were sufficiently collateral to the claims for benefits to justify waiver.

decided in the future. These two decisions are unique to the facts of the cases themselves, and will affect only the litigants who are directly involved in the actions.

D. <u>There Are No Other Reasons to Grant Review</u>.

The Secretary asserts, as her final argument in support of her petition, that the Eighth Circuit's assumption of jurisdiction in this case permitted it to rule prematurely on the pain standard contained in the Disability Benefits Reform Act. The Secretary asserts that, if the court had refused to waive the exhaustion requirement, the pain claim would have been dismissed, permitting the Secretary time to interpret the new standard in the first instance. Pet. 16. There are serious flaws in this reasoning.

As a threshold matter, it is important to note that the Secretary has not sought review of the Eighth Circuit's judgment that the July 17, 1984 order is consistent with the Reform Act.

Secondly, the Secretary is wrong in saying that the court's refusal to waive the exhaustion requirement would have resulted in dismissal of the pain claim.

Even if the court had found that it did not have jurisdiction over class members who had failed to exhaust their administrative remedies it would have continued to possess jurisdiction over the claims of named plaintiffs Lorraine Polaski and Patrick Blaschko, as well as over all other class members who had fulfilled the exhaustion

requirement.[6]

Contrary to the Secretary's assertions, the claims of the named plaintiffs regarding the pain issue were not automatically resolved by remand to the Secretary. The question of whether or not the terms of the court's July 17, 1984 order should be applied upon remand remained very much alive, especially in light of the Secretary's claim that this order was invalidated by passage of the Reform Act.

Nor is the Secretary correct in asserting that the court of appeals has acknowledged that all unnamed class members had not exhausted their administrative remedies. Pet. 15 n. 9. The

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[6]In addition to the named plaintiffs, the class would then have included individuals with pending judicial appeals and individuals who had exhausted their administrative remedies within the 60 days prior to the filing of the complaint.

statement on which the Secretary relies, found at page 19a of Petitioner's Appendix, refers only to those claimants "whose disability claims were denied by the Secretary but who at the time of certification were still pursuing administrative appeals, or if not pursuing administrative appeals, were not time barred from doing so." Pet. App. 18a. Earlier, the court had specifically directed that the claims of other unnamed class members were to be decided in accordance with the court's order. Pet. App. 18a.[7]

Similarly, the Secretary has no basis for arguing that, if the Court grants the petition for a writ of

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[7]The first sentence at the top of page 18a should read "Other unnamed plaintiffs raising the pain issue . . .." The court's original opinion contained an error. See Respondents' Appendix 1a.

certiorari in this case, it should vacate the judgment below regarding the pain standard. Pet. 17. The court's jurisdiction over the claims of the named plaintiffs and other class members who did exhaust their administrative remedies is clear. Since the Secretary has not requested review of the substance of the Eighth Circuit's decision regarding the effect of the Disability Benefits Reform Act on the July 17, 1984 order, there would be no basis for vacating the judgment as to pain even if the Court were to ultimately decide that the court below improperly assumed jurisdiction over a portion of the class.

CONCLUSION

The Secretary's petition for certiorari in this matter should be denied. In the alternative, the Court should hold this case for disposition in

light of its disposition or decision in Heckler v. City of New York and Heckler v. Owens.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENTS

September, 1985

RESPONDENTS' APPENDIX

M E M O R A N D U M

TO: All Counsel of Record

FROM: Robert D. St. Vrain, Clerk of Court, USCA8

DATE: March 18, 1985

RE: 84-5085 Lorraine Polaski, et al v. Margaret M. Heckler, etc.

Enclosed herewith please find corrected pages 15 and 19 in the referenced opinion of this Court filed on December 31, 1984. Please correct your opinion by inserting the enclosed pages.

cc. Honorable Gerald W. Heaney
Honorable John R. Gibson
Honorable George G. Fagg
Slip Opinion Subscribers
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Other unnamed plaintiffs raising the pain issue (but not the issue of medical improvement) have cases pending before this Court or district courts within the Circuit. These cases should be decided in accordance with this opinion by the courts having jurisdiction of the cases. Cases may be remanded to the Secretary where substantial evidentiary questions remain.

The clas as certified also includes claimants whose disability claims were denied by the Secretary but who at the time of certification were still pursuing administrative appeals, or if not pursuing administrative appeals, were not time barred from doing so. As to these claims, the district court concluded that a waiver of the requirement of exhaustion was appropriate in this case. This is the most difficult issue in this appeal. The Secretary argues that the Court does

not have jurisdiction over these cases and so must vacate this portion of the district court's preliminary injunction. The plaintiffs contend that the Court does have jurisdiction under the Social Security Act, 42 U.S.C. § 405(g) (1982), and the mandamus statute, 29 U.S.C. § 1361 (1982). We find that the Court does have jurisdiction over these claims and that this carefully defined section of the class is entitled to relief:

Section 405(g) provides that:

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides * * *.

This section involves several elements: (1) the individual must have presented a claim for benefits to the Secretary, and (2) the individual must have exhausted the administrative remedies

decided since July 17, 1984, will have their claims re-decided under the proper pain standard. Those class members whose claims were decided before this date have not received this relief. This result is not only unfair, but if permitted, would diminish the Court's authority to direct uniform and equitable relief in class actions.

Fourth, in light of the relief sought by the plaintiffs, deferring to the agency is both unnecessary and inappropriate. At this point in the proceedings no further elaboration of agency policy is likely. The parties' stipulation on pain and the 1984 Act have resolved the controversy over the appropriate standard. All that remains is to give these class members a chance to have their complaints of disabling

pain evaluated under the correct standard.

Finally, the plaintiffs' claims are admittedly not "wholly collateral" to their claims for benefits, as was true in Eldridge. But the focus of their relief as a class--the Secretary's compliance with our case law and the 1984 Act--is substantially collateral to the issue of whether they are in fact disabled and entitled to benefits. See City of New York v. Heckler, slip op. at 6028-29; Mental Health Association of Minnesota v. Heckler, 720 F.2d at 971.[3]

The district court narrowly tailored the class to meet the sixty-day requirement of section 405(g). Only

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[3]In light of our conclusion that there is jurisdiction under section 405(g), it is unnecessary for us to consider whether the mandamus statute provides an alternate basis for jurisdiction.

those class members who received an adverse decision from the Secretary within sixty days prior to the filing of the relevant class actions are entitled to relief here.[4]

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[4]The class members are those as described above who received an adverse decision within the following time periods: